In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1674

KINGS COUNTY et al.,
Petitioners

vs.

SANTA ROSA BAND OF INDIANS et al.,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief of Amici Curiae States of California, Alaska, Minnesota, Nebraska, Oregon and Washington

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. §§ 1254(1), Kings County has petitioned this Honorable Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit. This amicus curiae brief is respectfully submitted by the State of California, pursuant to Rule 42(4) of this Honorable Court, joined in by the states of Alaska, Minnesota, Nebraska, Oregon and Washington.

INTEREST OF THE AMICI STATES

The decision of the Court of Appeals, *Santa Rosa Band of Indians v. Kings County,* ..... F. 2d ..... (1975), deter-

mined two issues which substantially affect the ability of the State of California, as well as the ability of the states which have joined in this amicus brief, to carry out the congressional mandate embodied in Public Law 83-280, 28 U.S.C. § 1360. First, the Court of Appeals concluded that county ordinances were not "civil laws of [the] State . . . that are of general application . . . within the State. . . ." 28 U.S.C. § 1360. Second, assuming that county ordinances were applicable to the Santa Rosa Rancheria, it concluded that the enforcement of the County's zoning ordinances and building codes would constitute an "encumbrance" of the Indian reservation trust lands, contrary to the exception of Public Law 280 forbidding the "alienation, encumbrance, or taxation of any real or personal property . . . belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States. . . ." 28 U.S.C. § 1360(b).

As we shall note below, the conclusion that county ordinances are not within the congressional authority granted to the states by Public Law 280 misconceives the nature of the governmental relation between a state and its counties; it also ignores the fact that counties, in large part, enact zoning ordinances and building codes in response to a specific mandate imposed by state law, and that such ordinances and codes accordingly become part of the body of state law. Further, the interpretation of the "encumbrance" provision of Public Law 280 seriously misinterprets the congressional intention underlying Public Law 280. Both interpretations have contributed to a result unintended by Congress, one which prohibits the states from enforcing regulatory schemes which form highly significant portions of their attempts to protect the health and welfare of their citizenry. For each of these reasons, these *amici* states,

each of which is subject to the provisions of Public Law 280, have a substantial and real interest in the outcome of this litigation; California and the states of Alaska, Minnesota, Nebraska, Oregon and Washington accordingly file this amici curiae brief in support of the position of the petitioners.

I. Counties Are Political Subdivisions of a State, and Their Ordinances Are Accordingly "Civil Laws of [The] State . . . That Are of General Application" Within the Meaning of Public Law 280

There can be no dispute to the proposition that counties are political subdivisions of the state in which they are located. As the California Supreme Court has stated:

> "The county is merely a political subdivision of state government, exercising only the powers of the state granted by the state, created for the purpose of advancing 'the policy of the state at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of the means of travel and transport and expressly for the general administration of justice.'" *County of Marin v. Superior Court,* 53 Cal. 2d 633, 638-639 (1960).

The courts of each of the other Public Law 280 states which utilize a county system of government have recognized a similar rule. *State ex rel. Taylor v. Superior Court,* 2 Wash.2d 575, 98 P.2d 985 (Wash. 1940); *Franek v. Butler County,* 127 Neb. 852, 257 N.W. 235 (Neb. 1934); *Hitchcock v. Sherburne County,* 227 Minn. 132, 34 N.W. 2d 342 (Minn. 1948); *Powell Grove Cemetery Association v. Multnomah County,* 228 Ore. 597, 365 P.2d 1058 (Ore. 1961); *State v. Mutter,* 23 Wis. 2d 407, 127 N.W.2d 15

(Wis. 1964). This Court recently recognized the principle, holding:

> "Political subdivisions of states—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in *Hunter v. City of Pittsburgh,* 207 U.S. 161, 178, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them'. . . ." *Reynolds v. Sims,* 377 U.S. 533, 575 (1964).

The relationship of a county to its parent state is even more readily apparent when considered in light of the ordinances involved in this action. Kings County zoned the area on which the plaintiffs planned to use their mobile homes, for general agricultural use. C. T. 126. The use of the mobile homes within such an agricultural area is permissible under the zoning ordinance, so long as certain approvals are received from the County. The County building ordinances further require permits for electrical and plumbing hookups, and require payment of a fee for the permits and for inspections by the County. C. T. 120-121. Finally, the approvals required from the County must be preceded by the preparation and consideration of an environmental impact report under the California Environmental Quality Act, Cal. Public Resources Code §§ 21000 *et seq.* Before the County may grant such approvals, it must prepare and consider the environmental impact report and must act to mitigate any significant environmental impacts which would be caused by carrying out the proposed project. *Friends of Mammoth v. Board of Supervisors,* 8 Cal.3d 247, 263 fn. 8 (1972); *Burger v. County of Mendocino,* 45 Cal.App.3d 212 (1975). As we shall note below, each of the above ordinances was enacted, however, not as an exercise of any inherent power of the County, but in response to a direct obligation imposed *by state law.* Thus, under these circumstances, it may fairly be said that the County ordinances are, in fact, part and parcel of state law, designed to localize a statewide policy expressed in state statute.[1]

1. Since 1965, California law has required each County to "adopt a comprehensive, long-term general plan for the physical development of the county. . . ." Cal. Government Code § 65300. As a part of that plan, each County has been required to designate a "proposed general distribution and general location and extent of the use of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public building and grounds, solid and liquid waste disposal facilities, and other categories of public and private uses of land." Cal. Government Code § 65302. Since January 1974, all county zoning ordinances have been required to be consistent with the duly adopted general plan. Cal. Government Code § 65860. In addition, California law has long sought to encourage the preservation of the maximum amount of California's agricultural land, on the ground that it "is necessary not only to the maintenance of the agricultural economy of the state, but also for the assurance of adequate, healthful and nutritious

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1. We have referred in this brief only to the pertinent California statutes. Each of the signatory states to this brief, however, has similar and analogous statutes designed to allow a local governmental entity to conform state policy to the area under its jurisdiction. Alaska, for example, requires its local boroughs to engage in planning and zoning activities designed to localize its state-wide policies. See, A. S. 29.33.070.

food for future residents of this state and nation." Cal. Government Code § 51220.

By these and other similar enactments, the California legislature has attempted to guide the counties into a systematic consideration of the possible uses of their land resources, and to provide strong policy guidelines concerning the maintenance of agricultural lands. Hence, it is apparent that Kings County, by zoning the land here involved as agricultural, is simply following one of the basic policy mandates of state law; the County in no way exercises a discretion unlimited by state law, but only acts within the boundaries of established state policy to conform that policy to the local area within its jurisdiction. In this regard, then, the County exercises "only the powers of the state . . . . for the purpose of advancing 'the policy of the state at large, for purposes of political organization and civil administration.'" *County of Marin v. Superior Court, supra,* 53 Cal.2d 633, 638-639.

The decision of the Ninth Circuit, however, ignored this fact in its conclusion that county ordinances were not "civil laws of [the] state" within the meaning of Public Law 280. By such a holding, the Court has effectively eliminated any ability of California to include Indian lands within its comprehensive land use planning mechanisms.

2. By state law, California has similarly required each County to adopt the Uniform Building Code, promulgated by the International Conference of Building Officials, as its County Building Ordinance. Cal. Health and Safety Code § 17922; 25 Cal. Administrative Code § 1070. Hence, although the approvals required from Kings County for the respondents' proposed mobile home uses are set forth in county ordinances, and although the electrical and plumbing

permits and fees are likewise set forth in county ordinances, those ordinances are explicitly required by state law to conform to the Uniform Building Code. It is thus clear, again, that the County is only enforcing an obligation explicitly imposed upon it by state law; at the same time, it is enforcing a state law of general application throughout the state.

3. California law further requires each public agency which is considering approval of a proposed private "project" to prepare and consider an environmental impact report prior to approval of the project.[2] Cal. Public Resources Code § 21151. Such a report must consider, *inter alia,* the environmental impact of the proposed action, adverse environmental effects which cannot be avoided if the proposal is implemented, alternatives to the proposed project, and the growth-inducing aspects of the proposal. Cal. Public Resources Code §§ 21151 and 21100. This requirement of state law has been described as part of California's policy that ". . . highest priority shall be given to environmental considerations." *County of Inyo v. Yorty,* 32 Cal.App.3d 795, 804 (1973).

Thus, again, like the requirements under the County zoning ordinance and under the County building code, the Kings County requirements regarding preparation and consideration of an environmental impact report are explicitly required by California law: they are not requirements imposed only by the County, but requirements carried out by the County under the mandate of California law. As such, the County is only localizing one of the "civil laws

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2. The term "project" encompasses both projects to be carried out by a public agency, and private projects which require governmental approval. Cal. Public Resources Code § 21151; *Friends of Mammoth v. Board of Supervisors, supra,* 8 Cal.3d 247.

of [the] State . . . that [is] of general application . . . within the State . . . ." and the ordinance should accordingly be applicable to the Santa Rosa Rancheria.

4. California thus believes that the distinction drawn by the Ninth Circuit between "state" and "county" laws fails to reflect actual legislative practice, and prevents the proper realization of state policy. As we have noted above, the California counties play an indispensable role in enforcing California law and policy; they fulfill the critical function of adapting broad state policy to local conditions and thereby assure the most practical and efficient means of securing the ends mandated by the legislature. The Court, by holding that "county" ordinances are not applicable on the Santa Rosa Rancheria, has effectively prevented California from utilizing counties to administer the policy of the state, insofar as it applies to Indian lands; while disclaiming an intent to prohibit the application of state laws to Indian lands, the Court has achieved that very result. This conclusion is even more apparent in the case of Alaska. Alaska, unlike the other *amici* states, does not have Indian trust lands concentrated in easily defined reservations, but has trust lands scattered throughout the state, including metropolitan areas. The Ninth Circuit decision prevents the Alaskan boroughs from applying their land use control enactments to these lands; the result is accordingly the "'impractical pattern of checkerboard jurisdiction'" which this Court has only recently again condemned. *Moe v. Salish and Kootenai Tribes*, ... U.S. .... (April 27, 1976).

5. There is yet a further reason, moreover, for California's interest in the distinctions advanced by the Ninth Circuit. As we shall note, a number of California's significant environmental laws are enforced not by the state or counties, but by regional agencies. As part of their enforce-

ment activities, these regional agencies often adopt regulatory programs pursuant to state law which govern the areas within their jurisdiction, but which, under the Ninth Circuit's distinction between "state" and "county" laws, cannot be termed as laws "of general application" under Public Law 280.

California's water quality laws, for example, are enforced by the California State Water Resources Control Board and nine regional water quality control boards; each of the regional boards has primary jurisdiction over a specific geographical area of the state. Cal. Water Code §§ 13000 *et seq.* Under the analysis of the Ninth Circuit, however, the regional programs of the regional boards apparently would not apply to activities on Indian lands resulting in water pollution.

In addition, both federal law, Clean Air Act of 1970, 42 U.S.C. §§ 1857 *et seq.*, and state law, Cal. Health and Safety Code §§ 24198 *et seq.*, require the development of air pollution control plans applicable only to specific geographical areas because of air pollution problems specifically related to the area; under the Ninth Circuit analysis, however, these plans would not appear to be applicable to Indian lands, since they are not state laws of general application.

Further, the People of California established by initiative an administrative agency structure designed to formulate a plan for the future of the California coastline. Cal. Public Resources Code §§ 27000 *et seq.* During the period allowed by the initiative for the preparation of such a plan, regional coastal commissions are charged with the duty of enforcing a permit system for development proposed along the California coast. *Id.* The jurisdiction of each of the regional commissions does not extend throughout the state, however,

and, like the state regulation mentioned above, apparently would not extend to activities on Indian lands.

As a result of the Ninth Circuit decision, it thus appears that California may not utilize its regional mechanisms, chosen as the most efficient means of realizing California legislative policy, on Indian lands. That result is inconsistent with the congressional intent to terminate federal responsibility over the Indian tribes within the Public Law 280 states, and, to a large part, to assimilate them into state society. See, H.R. Rep. No. 848, 83rd Cong., 1st Sess. 3 (1953). As Congress expressed only two weeks prior to the passage of Public Law 280:

> ". . . [It] is the policy of Congress, as rapidly as possibile to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . .
>
> ". . . [It] is declared to be the sense of Congress that, at the earliest possible time, all the Indian tribes and the individual members thereof located within the State of California . . . . should be free from Federal supervision and control . . . ." 67 Stat. B132 (1953).

The Ninth Circuit pointedly ignored these legislative expressions, however, and resolved any difficulties in the statute by construing them not by the policy expressed by Congress, but by a repeated canon of construction favorable to Indian sovereignty. That course of action cannot stand in light of the recent declaration of this Court:

> "A canon of construction is not a license to disregard clear expressions of tribal and congressional intent . . . . Some might wish they had spoken differently, but we cannot remake history." *DeCoteau v. District Court,* 420 U.S. 425, 447-449 (1975).

California accordingly believes that the Kings County ordinances, enacted in response to a specific mandate from the California legislature, are "civil laws of [the] State . . . . that are of general application . . . within the State . . . ." 28 U.S.C. § 1360. The phrase "of general application" was not intended to prevent the application of county ordinances to Indian lands, but only to ensure that such ordinances be equally applicable to non-Indians as well as Indians.

II. State Land Use and Environmental Regulations Do Not Constitute Encumbrances Within the Meaning of Public Law 280

As an alternative ground of decision, the Ninth Circuit concluded that the Kings County ordinances constituted "encumbrances" within the meaning of Public Law 280, and hence were prohibited by the terms of the statute. As we shall explain below, however, such an interpretation is inconsistent with other language in Public Law 280; moreover, it fails to reflect the congressional policy underlying Public Law 280. As a result, the "encumbrance" language of the statute should be interpreted as encompassing only a property right which constitutes a burden on Indian property; the term has no application, however, to state laws and county ordinances regulating the use of property which do not create property rights adverse to those of the fee holder.

In the first instance, the interpretation of the Ninth Circuit is inconsistent with other language in Public Law 280: the statute expressly excepts Indian trust property from a state's *"regulation of the use"* if the regulation is inconsistent with a federal treaty, agreement, statute or regulation. Since Congress explicitly provided an exception to the state's power to regulate use, the congressional

intention was without question to permit state regulation of the use of Indian land. The Ninth Circuit's interpretation of the "encumbrance" exception, however, would totally preclude *any* land use regulation; thus, the two exceptions would irreconcilably conflict, since the "encumbrance" regulation would absolutely prohibit state regulation, while the "treaty, agreement, statute or regulation" exception would permit a broad range of state regulation. Such a conclusion would, of course, fail to properly construe the various parts of the statute harmoniously. See, *Schneiderman v. United States,* 320 U.S. 118 (1943).

More significantly, however, the Ninth Circuit misread the congressional policy underlying Public Law 280, and having so acted, interpreted the term "encumbrance" in a manner wholly inconsistent with the result intended by Congress.

As we noted above, the House Report accompanying Public Law 280 considered termination of federal supervision of Indians to be a critical purpose of the statute. H.R. Rep. No. 848, 83d Cong., 1st Sess. 3 (1953). The language used by the House of Representatives was incorporated by the Senate in its report on the statute. S. Rep. No. 699, 83d Cong., 1st Sess. (1953). After its passage, moreover, the Secretary of the Interior consistently referred to the purpose of the statute as being termination of federal responsibility. See, Annual Report of the Secretary of the Interior 34-37 (1953); Annual Report of the Secretary of the Interior 227 (1954). As we also noted above, only two weeks prior to the passage of Public Law 280, the Senate passed House Concurrent Resolution No. 108, which declared it to be the policy of the United States government to make Indians "subject to the same laws . . . as are applicable to other citizens of the United States, to end

their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship." 67 Stat. B132 (1953).

Where a word used in a statute is subject to equally reasonable interpretations, it must, of course, be interpreted to best achieve the end desired by Congress. Under this view, then, the term "encumbrance" should be interpreted narrowly, and should be applied only to bar the actual creation of an interest or right in the land, not to prohibit traditional state exercises of land use regulation. *Accord: People v. Rhodes,* 12 Cal.App.3d 720 (1970); *contra: Snohomish County v. Seattle Disposal Co.,* 70 Wash. 2d 668, 425 P.2d 22 (1967), *cert. den.* 389 U.S. 1016 (1967). Such an interpretation is consistent with a long-standing federal policy designed to prevent Indians from being divested of their lands. See generally, *United States v. Waller,* 243 U.S. 452 (1917); *Lykins v. McGrath,* 184 U.S. 169, 171-172 (1902); and *Beck v. Flournoy Live-Stock and Real Estate Co.,* 65 F. 30 (1894), *app. dism.* 163 U.S. 686; see also *Federal Indian Law* (U.S. Govt. Printing Office, 1958), 787-803.

CONCLUSION

For each of the above reasons, the *amici* states believe that the Ninth Circuit improperly interpreted the meaning of Public Law 280. Its decision misreads the congressional policy underlying the statute, and, as a result, reaches a conclusion wholly inconsistent with congressional intent. The states of California, Alaska, Minnesota, Nebraska, Oregon and Washington accordingly join with Kings County in urging that the petition for a writ of certiorari be granted.

Respectfully submitted,

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